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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 440

TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 728, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 24-33) is reported at 332 F. 2d 693. The Board's Decision and Order are reported at 133 NLRB 62.

JURISDICTION

The decree of the court of appeals was entered on June 29, 1964 (Pet. 34-36). The petition for a

writ of certiorari was filed on August 29, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board was warranted in ordering the union to cease and desist from engaging in unlawful secondary boycott activities not only against the particular primary employer immediately involved, but against other primary employers as well.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), in effect during the period here relevant, are set forth at pages 3-4 of the petition.[1]

STATEMENT

A. The Board's Findings of Fact

Overnite Transportation Company ("Overnite"), a large motor carrier of freight, has terminals and other places of business in the States of Virginia, North Carolina, South Carolina, and Georgia. (R. 35-36, 44, 47).[2] In the early part of 1959, petitioner

[1] Section 8(b)(4)(A) and (B) of the 1947 Act, the provisions involved here, were amended by the Labor-Management Reporting and Disclosure Act of 195 (73 Stat. 519, Pub. Law 86-257). The amendment does not affect the Board's order in this case.

[2] "R." refers to Volume I, Transcript of Record, filed in the court of appeals; "J.A." refers to portions of the testimony

and her affiliates of the International Brotherhood of Teamsters attempted to organize Overnite's employees (R. 47-48; J.A. 25-27). The union locals involved [3] held meetings at Atlanta, Georgia, and Charlotte, North Carolina, and, pursuant to an agreement reached at the meeting, each local requested recognition as bargaining representative of Overnite's employees within the area of its jurisdiction (R. 48; J.A. 26-29, 37-39, 51, 113). When Overnite rejected these requests, the several locals called a strike in May 1959 and picketed Overnite's terminals (R. 47, 76; J.A. 46-47). The signs carried by the pickets named Local 728 and the other Teamster locals as the unions involved in the dispute (R. 76; J.A. 7-9, 40, 101). Local 728 had responsibility for the conduct of the campaign in the State of Georgia and picketed Overnite terminals at Savannah and Atlanta (R. 76-77; J.A. 7-8, 47-50).[4]

Immediately after the strike began, Local 728 wrote to all trucking companies with which it had labor agreements informing them about the strike (R. 7; J.A. 9-11). These labor agreements contained a "hot cargo" provision which provided, *inter alia*, that Local 728 and its members reserved the right to

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and the exhibits printed in a joint appendix filed therein. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3] Local Union Nos. 71, 55 and 509, in addition to the petitioner.

[4] This case involves the Unions' acts in the State of Georgia. A companion case dealt with their activity in North Carolina (see n. 7, p. 7, *infra*).

refuse to accept freight from, or to make pick-ups or deliveries at, establishments which were struck or picketed by a union (R. 77; J.A. 106, 109-110).[5] The clause further provided that a contracting employer's insistence upon handling such "unfair" freight would be a sufficient cause for an immediate strike of all such employer's operations (J.A. 106-107). Petitioner's President, Cook, announced the start of the Overnite strike at a union meeting and told the members that they should use their own judgment as to whether they would handle Overnite freight (R. 77; J.A. 22-23, 52-53).

During the strike, Local 728 on six different occasions induced the employees of eight neutral trucking firms not to handle Overnite freight.

1. A member of Local 728 was requested by his employer, Atlanta-New Orleans Motor Freight Lines, to handle some Overnite freight at the terminal of his employer (R. 77-78; J.A. 16-17). When he called President Cook of Local 728 for advice, the latter told him, "I can't tell you anything. You do as you please. You don't have to handle no scab freight" (R. 77-78; J.A. 17-18). Cook also assured him that he would be "protected" if he did not handle the freight (*ibid.*).

2. Petitioner and the other union locals involved employed Oscar Evans, an organizer for Teamsters Joint Council No. 9, to picket Overnite terminals.

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[5] Under the 1947 Act, a "hot cargo" clause was not itself unlawful, but attempts to enforce it through work stoppages were proscribed. See *Local 1976, Carpenters* v. *National Labor Relations Board*, 357 U.S. 93.

Evans asked several over-the-road drivers of three neutral trucking companies[6] "to respect the picket line" (R. 78-79; J.A. 29-32). Since these drivers made no pick-ups or deliveries at Overnite terminals, they had no occasion to cross the picket line mentioned by the organizer (R. 78-79; J.A. 29-32, 35, 54-58). For that reason and in view of the hot cargo clause of the labor agreements, the organizer's request amounted to a request not to handle Overnite freight generally (R. 78-79).

3. When an Overnite truck arrived at the terminal of Georgia-Florida and Alabama Transportation Company, the shop steward of Local 728 told the company's foreman and one of its employees that the employees were not "supposed to handle Overnite freight" (R. 79; J.A. 66, 74-75). The dock foreman proceeded to handle the freight himself, and the other employees, members of Local 728, ceased working at the instruction of the shop steward until the foreman had finished checking the Overnite shipment (R. 79; J.A. 69-76).

4. At the terminal of Benton Rapid Transit Company, petitioner's shop steward, when asked by a management representative whether he would handle Overnite freight, replied that he would refuse (R. 79; J.A. 80-82). When some employees asked the shop steward whether they should handle such freight, he told them that under the "hot cargo" clause of the contract they did not have to (R. 80;

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[6] Associated Transport, Inc., Johnson Transfer Company, and Carolina Freight Carriers Corp.

J.A. 81, 84-87). Subsequently one employee refused to handle Overnite cargo (*ibid.*).

5. When an Overnite truck appeared at the terminal of B.C. Transportation Company, petitioner's shop steward told the employees of B. C. Transportation that he would not check Overnite freight. As a result, the Overnite driver had to return the freight to the Overnite warehouse. (R. 80; J.A. 12-15, 53-54.)

6. At the terminal of Great Southern Trucking Company, petitioner's steward, who worked as a driver for that employer, refused in the presence of other employees to move a trailer containing Overnite freight (R. 80; J.A. 79-80). When other drivers asked him what they should do about Overnite freight, the shop steward told them to "use their own judgment" (*ibid.*). The steward testified at the Board hearing that it was not necessary for him to tell employees what he would do if he were asked to handle Overnite freight, for "they had already seen what he would do" (*ibid.*).

B. The Decisions Below

The Board concluded that, by the conduct described above, petitioner and the other locals involved induced neutral employees not to handle Overnite freight, for the objects of forcing their employers to cease doing business with Overnite and of forcing Overnite to recognize the Unions as the representatives of its employees—in violation of Section 8(b)(4)(A) and (B) of the Act (R. 74-87, 110-112). The Board ordered petitioner and the other locals to cease and desist from inducing any individual em-

ployed by any person engaged in commerce to engage in a work stoppage with the object of (1) forcing or requiring any such person to cease doing business with Overnite, or (2) forcing or requiring Overnite to recognize or bargain with the Unions unless they shall have been certified by the Board (R. 113-119).

In addition, insofar as petitioner Local 728 was concerned, the Board order prohibited secondary pressure against not only Overnite, but also against "any other person engaged in commerce or in an industry affecting commerce" (R. 116-117). The examiner had proposed such a broad order against petitioner (R. 90), and in a companion case (*International Brotherhood of Teamsters, et al. and Overnite Transportation Company*, 130 NLRB 1007; J.A. 190-200) the Board explained the reason for the order. In that decision, which was expressly incorporated in

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[7] In that case, the Board found that Local 728 and the other locals violated Section 8(b)(4)(A) and (B) of the Act, when, in furtherance of the same dispute with Overnite, they picketed the terminals of 18 neutral motor carriers doing business with Overnite in the State of North Carolina. In the instant case, involving the Unions' activity in Georgia, a motion was made to dismiss the complaint on the ground that the Board had improperly split the cause of action by failing to consolidate the Georgia case with the Carolina case; the Board denied this motion (R. 64-69, 112), its action was sustained by the court of appeals (Pet. 31-32), and petitioner does not challenge these rulings here. Local 728 petitioned to review the Carolina case in the Court of Appeals for the District of Columbia Circuit, and, after that court remanded the case to the Board for reconsideration, the Board dismissed it on the ground, *inter alia*, that, in view of the order issued against Local 728 in the instant case, no useful purpose would be served in continuing the Carolina case (J.A. 238-239).

the instant decision (R. 75-76, 85), the Board stated (130 NLRB at 1009-1010; J.A. 194-195):

> The Order against Respondent Local 728 * * * will cover any future unlawful secondary boycott activity respecting any other primary person engaged in commerce or in an industry affecting commerce. A broad cease-and-desist order of this type against Local 728 appears necessary in order to effectuate the policies of the Act, because of the extent to which Local 728 had demonstrated a proclivity to violate the Act by secondary boycott activity against persons with whom it develops disputes. In addition to the instant case, involving as it does 18 secondary employers, there have been in recent times four other contested secondary boycott cases in which it has been necessary for the Board to issue orders against Local 728, and in which Local 728 has been found to have engaged in deliberate and extensive unlawful secondary activity in aid of its disputes.[*] * * * This record of persistent and repeated violations by Local 728 indicates the necessity of a broad order against it to prevent it from continuing, with impunity, to vio-

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[*] The Board listed the following cases: "*Truck Drivers and Helpers Local Union No. 728, etc.* v. *N.L.R.B. (Genuine Parts Co.)*, 265 F. 2d 439 (C.A. 5), cert. denied, 361 U.S. 917, enfg. 119 NLRB 399; *Truck Drivers and Helpers Local Union 728, etc.* v. *N.L.R.B. (Campbell Coal Co.)*, 249 F. 2d 512 (C.A. D.C.), cert. denied 355 U.S. 958, enfg. 116 NLRB 1020; *N.L.R.B.* v. *Truck Drivers & Helpers Local Union No. 728, etc. (National Trucking Co.)* (Ford Motor Co.), 228 F. 2d 791 (C.A. 5), enfg. 111 NLRB 483; *Truck Drivers and Helpers Local Union No. 728, etc. (Empire State Express, Inc.)*, 116 NLRB 615."

late the secondary boycott sections of the Act, free from restraint of prior orders more narrow in scope.

The court of appeals sustained the Board's findings and enforced its order in full (Pet. 24-33).

ARGUMENT

Petitioner does not here attack the findings of the Board, approved by the court below, that it violated the secondary boycott provisions of the Act. Its sole contention is that the Board's order is too broad because it requires Local 728 to cease and desist from secondary activities prohibited by Section 8(b)(4) of the Act not only in connection with its dispute with Overnite, but also in connection with disputes with any other primary employer. In the circumstances of this case such an order was well within the Board's remedial power, and the Board followed proper procedures in entering it. The Board's decision is not in conflict with the decisions of this Court or of any court of appeals. No further review is warranted.

1. It is settled that the Board may enjoin not only the particular unfair labor practice found, but also like and related acts which may be anticipated from the wrongdoer's past misconduct. *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 437; *International Brotherhood of Electrical Workers, Local 501* v. *National Labor Relations Board*, 341 U.S. 694, 705-706; *Local 74, United Brotherhood of Carpenters* v. *National Labor Relations Board*, 341 U.S. 707, 715; see, also, *Communica-*

tions Workers v. *National Labor Relations Board*, 362 U.S. 479, 480-481. While in the case of the other locals the Board limited its prohibition of unlawful secondary boycott activities to those arising out of the dispute with Overnite, it found that a broad order against petitioner was "necessary * * * because of the extent to which Local 728 had demonstrated a proclivity to violate the Act by secondary boycott activity against persons with whom it develops disputes" (pp. 8-9, *supra*). This conclusion was fully justified. As the court below pointed out (Pet. 32-33), in "addition to the facts of this case which resulted in a finding by the Board that Local 728 pursued an overall plan according to which the employees of eight separate neutral employers were induced to refuse to handle Overnite shipments, the Board had other cases involving this Local," which indicated that it had engaged in similar secondary boycott activity in furtherance of disputes with other primary employers (see n. 8, p. 8, *supra*). Such a history of similar violations of the Act affords a sufficient basis for an order barring the union from engaging in illegal activity with respect to not only the employer immediately involved, but other employers as well. See *National Labor Relations Board* v. *Local 294, International Brotherhood of Teamsters*, 298 F. 2d 105, 108, n. 2 (C.A. 2); *National Labor Relations Board* v. *Local 542, International Union of Operating Engineers*, 329 F. 2d 512, 515-516 (C.A. 3); *National Labor Relations Board* v. *United Mine Workers, District 31*, 198 F. 2d 389, 390-391 (C.A. 4), certiorari denied, 344 U.S. 884; *National Labor Relations Board* v. *Local*

135, International Brotherhood of Teamsters, 267 F. 2d 870, 874 (C.A. 7), certiorari denied, 361 U.S. 914; *National Labor Relations Board* v. *United Brotherhood of Carpenters*, 321 F. 2d 126, 129-130 (C.A. 9), certiorari denied, 375 U.S. 953.[9]

2. There is no conflict of decisions. The cases relied on by petitioner (Pet. 10, 13-15) are distinguishable on their facts. Thus, in *National Labor Relations Board* v. *Local 476, Plumbers*, 280 F. 2d 441, the First Circuit refused to enforce a broad order because, unlike here, there was insufficient basis for concluding that the union was likely to engage in similar conduct against other employees (p. 443). Cf. *National Labor Relations Board* v. *Springfield Bldg. & Construction Trades Council*, 262 F. 2d 494, 498-499 (C.A. 1). Similarly, in *National Labor Relations Board* v. *United Brotherhood of Carpenters*, 276 F. 2d 694, the Seventh Circuit refused to sustain a broad order because there, unlike here and in its earlier decision in *Local 135, supra*, there was no showing of prior violation by the union (p. 698).[10] Moreover, the

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[9] Petitioner's claim (Pet. 15-21) that the prior violations committed by it were not so serious as to justify the issuance of a broad order does not require a different conclusion. This was a judgment for the Board to make, and where, as here, that judgment is not patently unreasonable, it will not be disturbed by the reviewing court. See *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 348-349.

[10] In *National Labor Relations Board* v. *Brandman Iron Company*, (cited erroneously as *Grandman Allen Co.*, Pet. 10, 14), 281 F. 2d 797, the Sixth Circuit did refuse to enforce a broad order despite the fact that the parties had consented to the entry of such an order. However, that decision was reversed by this Court, 368 U.S. 399.

fact that the Fifth Circuit refused to enforce a broad order against Local 728 in an earlier case (Pet. 14) merely shows that, as of that date, there was not sufficient evidence of repeated violations to justify such an order; Local 728's repetition of the same illegal conduct in this case demonstrates that there is now such evidence.

3. The claim that the Board abridged petitioner's constitutional rights, by failing to give it the "right to introduce evidence and to be heard on" the issue whether a broad order should be entered (Pet. 12), is insubstantial. In "devising a remedy the Board is not confined to the record of a particular proceeding," but may draw upon its cumulative experience (*National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 348-349), and this of course includes its own record of a party's prior violations. Here the Board's judgment that a broad order was necessary rested in large part on the fact that Local 728 violated the secondary boycott provisions of the Act on previous occasions. There was no need for a hearing to determine whether such violations had occurred; they were a matter of public record and were not subject to relitigation. Insofar as petitioner contended that the prior violations did not justify a broad order in the present case (see Pet. 15-22), this involved no question of fact, but, at best, only a legal issue; and petitioner had full opportunity to, and in fact did, present its legal argument to the Board in its exceptions to the Trial Examiner's recommended order (R. 99, 107-109). Moreover, since the order recommended by the Trial Examiner was the same as that later

adopted by the Board (R. 85-86, 90-92, 96-98), "the issues and contentions of the parties were clearly defined" *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350-351, before the Board issued its order, and petitioner thus had "a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan* v. *United States*, 304 U.S. 1, 18.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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